No. 03-412

IN THE

Supreme Court of the United States

POLLUX HOLDING LTD.,

Petitioner,

—v.—

THE CHASE MANHATTAN BANK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the United States Court of Appeals for the Second Circuit properly affirm the dismissal of these actions on the grounds of *forum non conveniens* where the United States District Court for the Southern District of New York found that the factors outlined in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) favored England as the appropriate forum to resolve the allegations and claims in the complaints?

PARTIES

The following is a list of all parties to the proceeding in the Court whose judgment is sought to be reviewed:

Pollux Holding Ltd.

Springwell Navigation Corp.

The Chase Manhattan Bank, now known as JPMorgan Chase Bank

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent JPMorgan Chase Bank, formerly known as The Chase Manhattan Bank, has the following parent, subsidiary or affiliates (in which a 10% or greater interest is held) the securities or interests in which are publicly held: J.P. Morgan Chase & Co.

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Respondent, JPMorgan Chase Bank, formerly known as The Chase Manhattan Bank ("Respondent" or "Chase"), submits this brief in opposition to the Petitions for Writs of Certiorari ("Petitions") submitted by Pollux Holding Ltd. ("Pollux") and Springwell Navigation Corp. ("Springwell" and collectively with Pollux, "Petitioners"), who seek review of a decision of the United States Court of Appeals for the Second Circuit ("Court of Appeals") in *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64 (2d Cir. 2003). The issues raised in both Pollux's and Springwell's Petitions are virtually identical and the cases were heard and decided together in the United States District Court for the Southern District of New York ("District Court") and the Court of Appeals. This brief, which is being separately filed in response to each Petition, addresses all the issues presented by both Petitioners.

PRELIMINARY STATEMENT

The decision by the Court of Appeals does not warrant review by the Court. These Petitions involve dismissals on the grounds of *forum non conveniens* of complaints brought by foreign plaintiffs where the core allegations are the alleged actions and omissions in London, England by an employee of Chase's English affiliate, with respect to the sale of investments governed by English law, to longstanding customers of the London branch of Chase's Private Bank.

Petitioners seek to engage the Court in a rebalancing and reanalysis of the District Court's application of the well-established *forum non conveniens* factors. The District Court evaluated the allegations in the complaints, the connections between the allegations in the complaints and the selected forum (New York) and the con-

tacts between Petitioners and New York and through a careful and detailed analysis of each individual factor determined that England was the appropriate forum to hear the cases. Despite Petitioners' protestations to the contrary, the District Court not only considered the application of the treaty at issue on the *forum non conveniens* analysis, but gave the foreign Petitioners heightened deference and treated them as if they were American citizens. On appeal, the Court of Appeals affirmed that the District Court acted within its discretion and in accordance with governing precedent. To consider these Petitions at this point would necessarily require the Court to reconsider the factual determinations previously made by the District Court, and would not involve a decision on any controlling legal issues.

Petitioners attempt to create an issue for review by the Court by advancing the absurd notion that Liberian nationals, protected by the Treaty of Friendship, Commerce and Navigation, Aug. 8, 1938, U.S.-Liberia, 54 Stat. 1739 (the "Treaty"), which grants them "free access" or "freedom of access" to United States courts, have greater access to the United States courts than would United States citizens. In essence, Petitioners argue that they are immunized from the application of the doctrine of *forum non conveniens* by virtue of the "free access" provisions of the Treaty and that this immunity is somehow critical to the maintenance of good foreign trade relations. Petitioners, though, cannot sustain their position that the Treaty should provide more rights to these foreign companies than afforded to United States citizens. To the contrary, in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), the Court has already decided that the term "free access," in the very same Liberian treaty at issue here, is expressly subject to local law—of which *forum non conveniens* principles are a well-established and integral

part. Petitioners have not identified a single decision by any court adopting the illogical notion that is the underpinning of the Petitions. Contrary to Petitioners' assertions, there is no Treaty issue, there is no Supremacy Clause issue, and there is no split in the Circuits. The Petitions should be denied.

COUNTER-STATEMENT OF THE CASE

Petitioners attempt to manufacture New York contacts in order to create an illusion that the District Court and the Court of Appeals ignored the "numerous connections with respondent's home forum." Springwell Pet. at 3. In fact, the numerous contacts alleged in the Petitions are at odds with Petitioners' own complaints or are unrelated to the causes of action in the complaints. Petitioners conveniently ignore the allegations in their complaints because those allegations make clear that London is the center of gravity for this dispute.

Proceedings And Dispositions Below

Pollux and Springwell, both Liberian investment companies whose principals are Greek nationals, filed separate complaints against Chase in the District Court for the Southern District of New York. JA12-51, JA53-79, JA955.[1] The complaints allege that Pollux and Springwell each lost substantial amounts of money they invested in Russian derivative investments that were sold in London, England by an employee of an English affiliate of Chase. JA957-959. The misrepresentations and breaches of duty alleged in the complaints occurred in England and Greece. JA958-960. The transaction documents contain English forum selection and choice of

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[1] References to materials in the Joint Appendix in the Court of Appeals are in the form "JA__."

law provisions. JA959. Petitioners sued under English, not United States, securities laws. JA49.

Respondent moved to dismiss both actions on the ground of *forum non conveniens*. The District Court held that Chase "met its heavy burden of showing that New York, where defendant resides, is an inconvenient forum for litigation of this action, and conclude[d] therefore that this case should be dismissed pursuant to the doctrine of *forum non conveniens*." Pollux App. at 43a; Springwell App. at B18. Pollux and Springwell appealed to the United States Court of Appeals for the Second Circuit. The Court of Appeals affirmed the dismissal against both Pollux and Springwell. *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64 (2d Cir. 2003). Both the District Court and the Court of Appeals considered these actions in tandem.[2]

Petitioners' Relationship With Chase Was Based, And The Relevant Events Occurred, In London, England

The Petitions fail to acknowledge the overwhelming connection between these actions and England, and the corresponding lack of nexus between these actions and the United States. Analysis of the allegations at issue in

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[2] On April 9, 2001, shortly after the District Court's dismissal, Chase commenced negative declaratory judgment actions against both Pollux and Springwell in the High Court of Justice Queen's Bench Division, Commercial Court, Royal Courts of Justice in London, England (the "High Court of Justice") to determine the parties' rights and responsibilities in connection with the investments at issue in these actions. The High Court of Justice seized jurisdiction of these cases. By the agreement of the parties, these proceedings have been stayed pending the exhaustion of Petitioners' appellate avenues in the United States. Separate from the negative declaratory judgment actions filed by Chase, Springwell recently issued a claim form in the High Court of Justice on July 18, 2003 against three Chase entities arising from the same allegations at issue in these actions.

the complaints demonstrates that Petitioners' relationship with Chase and its affiliates, and the specific investment transactions at issue, were clearly centered in London, England. Petitioners are Liberian companies that serve as investment vehicles for wealthy Greek citizens. JA12, 54, 492, 723. Pollux invests for Diamantis Diamantides. Springwell invests for Adam and Spiros Polemis. Both Mr. Diamantides and the Polemis brothers had long-standing banking relationships with Chase's Global Shipping Group, JA15, 55, 84, which is located in London, England. JA84. The Polemis brothers first established a relationship with Chase's Private Bank in London in the late 1980's in order to engage in investment activity through Chase and its affiliates. In or about 1990, Mr. Diamantides established a relationship with Chase's Private Bank in London for the same purpose. JA100-106. The Private Bank—principally in London—provided oversight for Petitioners' accounts and assisted them in confirming transactions, moving funds among accounts, and obtaining financing arrangements for investments. Any meetings with Chase's New York personnel were conducted in Europe, principally in London or Greece. JA338.

Petitioners began to purchase emerging market products through Justin Atkinson, a salesperson employed in London by Chase's English affiliate, Chase Manhattan International Limited ("CMIL"). JA15-16, 55, 57-58, 85, 950. Mr. Atkinson was never employed by Chase's Private Bank, JA950, and Mr. Diamantides and the Polemises knew that he was a sales representative working in CMIL's International Fixed Income Group in London. *See* JA107, 112. Mr. Atkinson coordinated with Mr. Diamantides and his in-house financial staff located in Greece and received orders to purchase over the telephone at his desk in London. JA85, 724, 951. Mr. Atkinson coordinated all transactions for Springwell through

Adam Polemis, who was located in London during the time of these transactions. In short, all of Petitioners' relevant contacts at Chase were in London or elsewhere in Europe.

CMIL sold an investment product that allowed non-Russian entities to effectively invest in short-term, ruble denominated Russian treasury bills, known as GKOs. JA87, 121. The product was a structured instrument called the GKO-linked (S Account) note (the "Note" or "Notes"), where the return and risks were based on the performance of a particular issue of GKOs referenced in the Note. JA87, 122-123, 125-128. The Notes were issued by Chase Manhattan Securities (C.I.) Limited ("CMSCI"), a Chase affiliate in Jersey, Channel Islands.[3] JA120, 132. CMSCI did not purchase the underlying GKOs itself; instead, investments in the GKOs were made by CMIL, which had a special account, known as an "S Account," with a Russian bank allowing it to purchase GKOs as a foreign investor. JA19-20, 32-33. The Notes were governed by English law and provided for exclusive jurisdiction in England. JA130, 142-143.

Contrary to the factual background given in the Petitions, Springwell Pet. at 2-5; Pollux Pet. at 2-4, the crux of Pollux's and Springwell's allegations in their complaints center around the alleged fraudulent inducement to purchase such Notes through the misrepresentation of facts and the failure to disclose material information to Petitioners by Mr. Atkinson in London.[4] JA64. Petitioners' orders to purchase were given to Mr. Atkinson

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[3] Jersey is one of the Channel Islands located eighty-five miles from the English coast. Jersey owes allegiance to the British Crown. *See http://www.jerseylegalinfo.je/Home/AboutJersey/default.asp* (last visited Dec. 10, 2003).

[4] Nowhere in the complaints, or anywhere else in the record, do Petitioners allege a single misrepresentation by anyone other than

in London.[5] JA85, 90, 950-51. The trading of the Notes themselves was performed in London by traders in CMIL's International Fixed Income Group. JA90.

Petitioners financed a number of their Note purchases, including each of the purchases now at issue, through repurchase agreements. In connection with such financings, Petitioners each executed a Global Master Repurchase Agreement (the "Repurchase Agreement"), under which Pollux and Springwell each bought the Notes, but then immediately resold them to Chase London. Pollux and Springwell would repurchase the Notes at maturity for the same price paid for them by Chase London, plus a finance charge.[6] The Repurchase Agreements were signed on behalf of Chase by a representative in London, and the credit exposure was booked at Chase-London and subject to English regulation. JA159, 192. The

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Atkinson. Moreover, Petitioners' contacts with other representatives of Chase or its affiliates, which were primarily social in nature, did not take place in the United States, but took place in England or elsewhere in Europe. JA952, 967-968.

[5] Petitioners wrongly assert that the investments at issue were made and managed through the Hellenic and Maritime Industries Group of Chase's Private Bank in New York. Springwell Pet. at 3; Pollux Pet. at 3. The investments were made through CMIL, Chase's English affiliate, and the Notes were issued by CMSCI, a Chase affiliate in the Channel Islands. Neither is it true, as Petitioners allege, that the marketing of those securities was directed by Chase from New York. *See* Springwell Pet. at 4; Pollux Pet. at 13.

[6] After purchasing the Notes in London, Pollux and Springwell transferred the purchase funds to their Chase accounts in New York. Consequently, purchase confirmations and related documentation for the Notes were generated in New York. Petitioners attempt to elevate these functions in order to claim that New York was intimately involved in these transactions. However, these "back office" functions that were performed in New York were administrative and no allegation is found in Petitioners' complaints as to a breach of the performance of these functions.

Repurchase Agreements are also expressly governed by English law and provide that Pollux and Springwell submit to the non-exclusive jurisdiction of the English courts. JA158, 191.

Documents relating to Petitioners' investment and financing transactions were produced in a variety of places, including the International Fixed Income Group in London, CMSCI in Jersey, Channel Islands, and the London branch of Chase's Private Bank, with "back office" and other administrative support from Chase in New York. JA91-92.

Contrary to Petitioners' assertions, the key transactions at issue in the complaints involved London-based entities: the Note purchases were made through CMIL employees and the financing for those purchases was accomplished through facilities extended by the London branch of Chase's Private Bank.

REASONS FOR DENYING THE WRIT

I. There Is No Legal Dispute Warranting A Grant Of Certiorari Because The Court Of Appeals Correctly Found That The District Court Did Not Abuse Its Discretion In Applying The Well-Established Law Relating To The Doctrine Of *Forum Non Conveniens*

A. The District Court Carefully Weighed All Of The *Gilbert* Factors And Correctly Found That The Balancing Of The Factors Weighed In Favor Of Dismissal

The doctrine of *forum non conveniens* gives a trial court discretion to refuse to exercise its jurisdiction when it appears that another forum may be appropriate for the resolution of the matter, either for the conve-

nience of the parties or to serve the ends of justice. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 503 (1947). The law on *forum non conveniens* is well established and clearly articulated by the Court in *Gilbert* and *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). In evaluating whether a case should be dismissed on the basis of *forum non conveniens*, a district court must first determine whether an adequate alternative forum exists, and, if so, then balance the public and private interest factors to determine which forum would be more appropriate for the matter to be resolved. *See Gilbert*, 330 U.S. at 507-09. It is well settled that a *forum non conveniens* analysis rests in the sound discretion of the trial court and should only be disturbed if the court clearly abused its discretion. *Piper*, 454 U.S. at 257 ("[W]here the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves *substantial deference*.") (emphasis added).

The District Court properly considered the arguments and evidence presented to it and first determined that England would be an adequate alternative forum.[7] Pollux App. at 31a; Springwell App. at B7. Then, based upon the allegations in the complaints and the evidence presented, the District Court carefully weighed each of the "private interest" and "public interest" factors articulated in *Gilbert* and determined that England would be

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[7] Petitioners engage in a discussion of the relative merits of various possible fora for this action, including New York, Greece and Liberia. *See* Pollux Pet. at 12-13; *see generally* Springwell Pet. at 14. However, that analysis was not shared with the District Court and thus was not considered by the District Court in dismissing the complaints. Chase argued in its motion to dismiss that London would be a more convenient forum. Consequently, the District Court and the Court of Appeals properly focused on whether London or New York would be a more convenient forum for resolution of this dispute.

the more appropriate forum. Pollux App. at 41a; Springwell App. at B17. Specifically, with respect to the "public interest" factors, the District Court made the following findings:

- *Local Interest*: England has a stronger interest in the dispute than New York because the Notes were purchased in England; English securities law applied to the transactions; most interactions between the parties took place in England; the alleged fraud and misrepresentation occurred primarily in England; and the contracts at issue were entered into in England.
- *Burden on a Local Jury*: The jury burden factor favors litigation in England only slightly.
- *Conflict of Laws and Application of Foreign Law*: Since the majority of Petitioners' claims would likely be governed by English law, this factor strongly weighs in favor of dismissal.
- *Court Congestion and Enforceability of Judgment*: This factor favors neither forum.

With respect to the "private interest" factors, the District Court made the following findings:

- *Ease of Access to Proof*: Since there are documents in multiple locations, this factor does not favor dismissal.
- *Availability of Compulsory Process*: The existence of material witnesses that could only be compelled to testify in England weighs heavily in favor of dismissal.
- *Cost of Obtaining Witnesses and Other Practical Problems*: In the modern era, these factors are not relevant to the analysis.

In recognition that the District Court properly applied the *Gilbert* factors, the Court of Appeals deferred to the District Court's discretion and affirmed the decision to dismiss the actions on the grounds of *forum non conveniens*. *Pollux v. Chase*, 329 F.3d at 77-78. The Court of Appeals' decision appreciates the District Court's deliberate and thoughtful analysis of the facts and evidence before it. Neither the District Court's opinion nor the decision of the Court of Appeals conflict with this Court's precedent. Rather, the opinions below adhere to the cautious and discretionary application of the doctrine of *forum non conveniens*.

Petitioners argue that despite the District Court's careful analysis of the allegations and evidence in accordance with the *Gilbert* factors, the Court should grant a writ of certiorari to reconsider the District Court's factual findings. *See* Pollux Pet. at 12-14; Springwell Pet. at 13-15. Petitioner Springwell specifically requests the Court to review the factual determinations made by the District Court, and affirmed by the Court of Appeals, regarding the relative weight certain *Gilbert* factors received. *See* Springwell Pet. at 15-18. Accepting these arguments would undermine the well-established principle that *forum non conveniens* analysis rests within the sound discretion of the District Court. *See Piper*, 454 U.S. at 257; *see also Blau v. Lehman*, 368 U.S. 403, 408 (1962) (holding that the Court will not overturn factual findings made by a district court and affirmed by court of appeals absent "clear error"). However, in the interest of completeness, Respondent will address the specific factual findings raised by Petitioners as possible arguments on which to grant a writ of certiorari.

B. Petitioners' Choice Of Forum Was Given Appropriate Deference

Contrary to Petitioners' contentions, Pollux Pet. at 11-12; Springwell Pet. at 10, both the District Court and the Court of Appeals afforded appropriate deference to Petitioners' choice of forum. The District Court afforded Petitioners "the same initial deference in choosing a United States court as would a United States citizen." Pollux App. at 33a; Springwell App. at B9. As the Court of Appeals acknowledged, even a United States citizen's choice of forum is not dispositive; instead, the level of deference depends upon the connection between the plaintiff and the forum. *Pollux v. Chase*, 329 F.3d at 72 (citing *DiRienzo v. Philip Servs. Corp.*, 294 F.3d 21, 28 (2d Cir. 2002) ("The level of deference given to a plaintiff's choice of forum depends on the bona fide connection the plaintiff has with that forum.")). The District Court considered the contacts that Petitioners had with the chosen forum and then concluded that despite being given the deference of United States citizens who are not residents of the forum, Petitioners' lack of contacts with New York justified dismissal in favor of a more convenient forum, England. *Id.* The Court of Appeals affirmed the District Court's analysis and concluded that Petitioners should be given the "deference afforded a U.S. citizen living abroad who sues in a U.S. forum." *Pollux v. Chase*, 329 F.3d at 73.

Petitioner Springwell asserts that the Court of Appeals focused "on residence rather than on treaty rights and citizenship status." Springwell Pet. at 10. This claim is misplaced. The Court of Appeals looked to the contacts Petitioners had with the United States *after* it accepted the level of deference given to Petitioners by the District Court. The Court of Appeals found the absence of contacts with the forum a significant factor in the *forum non*

conveniens analysis, just as other courts have looked to a United States citizen's contacts in determining whether to dismiss a case in favor of a foreign forum. Indeed, many courts have dismissed United States citizen's claims based upon *forum non conveniens*. *See Forsythe v. Saudi Arabian Airlines Corp.*, 885 F.2d 285, 290-91 (5th Cir. 1989) (finding *forum non conveniens* dismissal appropriate in an action brought by an American citizen against a Saudi Arabian airline where allegations giving rise to the cause of action occurred in Saudi Arabia); *Meridian Seafood Prods. v. Fianzas Monterrey*, 149 F. Supp. 2d 1234, 1238 (S.D. Cal. 2001) (dismissing action brought in California by California corporation where *Gilbert* factors weighed in favor of litigation in Mexico); *In re Donald G. Atteberry, DVM, P.A. v. Barclays Bank*, 159 B.R. 1, 7-8 (D. Kan. 1993) (affirming *forum non conveniens* dismissal against a United States citizen in favor of litigation in England).

Petitioner Springwell also takes issue with the fact the proposed alternative forum, London, England, is home to neither party and questions why Respondent seeks to remove this action there. Springwell Pet. at 13-14. The simple answer is that London is a more convenient forum in which to litigate these actions. All parties have strong connections with London. Petitioner Springwell, at the time it was doing the transactions at issue in its complaint, maintained offices in London and the Springwell representative who made the trades lived there. Chase also has a substantial presence in London, including its English affiliate with which Petitioners made every one of the emerging market investments that are the subject of the lawsuits. Moreover, nearly all of the relevant events alleged in the complaints occurred in London. The contacts with London were overwhelming; so much so that when the District Court dismissed the complaints Chase itself commenced declaratory judg-

ment actions in English courts, and Springwell has likewise initiated its own action there on the same matters at issue here.

Petitioners also fail to mention, as they have acknowledged in briefing to the District Court, that they chose a United States forum because it provides broader discovery and punitive damages not available in England. Petitioners' unfounded criticism of the District Court's decision that London provided an appropriate alternative forum to the one they shopped for cannot provide any basis for granting certiorari.

C. The District Court Correctly Applied *Gilbert's* Compulsory Process Factor

Petitioner Springwell argues that the Court of Appeals erred in endorsing the District Court's finding that the compulsory process factor "weighs heavily in favor of dismissal." Springwell Pet. at 15. In doing so, Petitioner Springwell is asking the Court to revisit the careful factual determinations made by the District Court. Although the Court will not overturn factual finding absent clear error, *see Blau*, 368 U.S. at 408, Respondent will address this point below.

Petitioner Springwell asserts that the compulsory process factor is only applicable if there is a showing that witnesses are "unwilling" to appear. *Id.* This is not the law as outlined in one of this Court's seminal cases on *forum non conveniens*, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). In *Piper*, the Court addressed the type of evidentiary support required to show that relevant witnesses were available only in the alternative forum. The Court specifically held that it was not necessary for

> defendants seeking forum non conveniens dismissal [to] submit affidavits identifying the witnesses they

> would call and the testimony these witnesses would provide if the trial were held in the alternative forum . . . . [Rather,] defendants must provide enough information to enable the District Court to balance the parties' interests . . . [such as] affidavits describing the evidentiary problems they would face if the trial were held in the United States.

Id. at 258-59. In *Piper*, the Court found adequate an affidavit that set forth a list of potential witnesses located in the alternative forum. *See id.* at 259. No additional showing of unwillingness was required.

In these actions, the District Court reviewed a list of witnesses that would be called at trial, their present whereabouts, and the substance of their testimony. Based upon this evidence, the District Court concluded that the availability of London-based witnesses "would be critical to [Chase's] defense at trial." Pollux App. at 40a; Springwell App. at B15. Further, the District Court found that Petitioners "have not demonstrated that any material witnesses would be unavailable at a trial in London." Pollux App. at 41a; Springwell App. at B16. The Court of Appeals affirmed. Since the District Court followed the law as set forth in *Piper*, the Court of Appeals' failure to require proof of "unwillingness" cannot be considered "clear error" justifying this Court's reconsideration of the factual analysis done by the District Court.

D. The District Court Properly Evaluated *Gilbert's* Foreign Law Factor

Petitioner Springwell argues that the foreign law factor of *Gilbert* is inapplicable since both local and foreign law may apply regardless of whether the case is heard in England or the United States. *See* Springwell Pet. at 17-18. Again, Petitioner Springwell is asking the Court to

revisit a factual finding made by the District Court and affirmed by the Court of Appeals. The District Court carefully examined the complaints to determine whether English law or U.S. law would apply to each claim. The District Court found, and the Court of Appeals affirmed, that English law would apply to the vast majority of Petitioners' claims. Clearly, English law would apply to Petitioners' claims brought under the English securities laws. Additionally, the District Court properly concluded that a court "likely would enforce the [English] choice of law provisions" contained in the Notes and the financing agreements. JA971. The District Court further found that English law would primarily apply to Petitioners' tort claims since most of the relevant conduct occurred in England.

On balance, the District Court concluded that English law would be the primary governing law for the complaints and that the factor weighed in favor of dismissal. Petitioner Springwell's invitation for the Court to reconsider this analysis would not further the development of *forum non conveniens* jurisprudence and should be rejected.[8]

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[8] Moreover, Petitioner Springwell seeks to elevate the importance of this single factor in contravention to the balancing of all of the factors required by this Court's decision in *Gilbert*. *See* Springwell Pet. at 17. Again, the District Court balanced *each* of the *Gilbert* factors and found that the foreign law factor was just one of the public interest factors that weighed in favor of dismissal. Since Petitioner Springwell merely seeks a rebalancing of the *Gilbert* factors, with an undue emphasis on this factor, there is no basis for the Court to review this issue.

II. Petitioners' Treaty Argument Cannot Form The Basis For A Writ Of Certiorari

A. The Court Of Appeals And The District Court Afforded Petitioners The Appropriate Level Of Deference, Even Considering The Treaty Between Liberia And The United States

The thrust of Petitioners' argument is that the grant of "free access" or "freedom of access" to United States courts in the Treaty gives Liberians *greater rights* than American citizens enjoy. Pollux Pet. at 6; Springwell Pet. at 9. Petitioners assert, without citation to any applicable authority, that by the application of the Treaty, they should be considered immune from the doctrine of *forum non conveniens*. This baseless argument falls far short of creating a basis on which to grant certiorari.

The United States has entered into a number of treaties with other nations that are designed to provide the citizens of each country reciprocal privileges in the other signatory country. However, these treaties are not designed to give greater rights than those afforded citizens. *See Sumitomo Shoji Am. v. Avagliano*, 457 U.S. 176, 187-188 (1982) ("The purpose of the Treaties was not to give foreign corporations greater rights than domestic companies, but instead to assure them the right to conduct business on an equal basis without suffering discrimination based on their alienage."). Petitioners' attempt to construe the "free access" provision in the Treaty in any other fashion is inconsistent with the purpose and intent of the Treaty.

In this case, both the Court of Appeals and the District Court gave Petitioners, foreign corporations, deference in light of the Treaty, which affords Liberian corporations "free access" to United States courts. *See* Pollux

App. at 61A. Instead of treating Petitioners as foreign plaintiffs not protected by a treaty, the lower courts concluded that the Treaty provided Petitioners with the level of deference given to American citizens living abroad, and conducted the *forum non conveniens* analysis with that deference in mind. Pollux App. at 33a; Springwell App. at B9.

The Court's decision in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) is particularly instructive on the interpretation of the "free access" phrase found in the Treaty. In that case, a Liberian corporation brought an action in Federal District Court against the Republic of Argentina. The Liberian corporation alleged that its oil tanker was severely damaged when it was attacked in international waters by Argentine military aircraft during the war between Great Britain and the Republic of Argentina and that it was entitled to damages under the Alien Tort Statute. The Republic of Argentina argued that it was immune from suit under the Foreign Sovereign Immunity Act ("FSIA"). In response, the Liberian corporation argued that the treaty between the United States and Liberia—the very same treaty at issue in this case—created an exception to the FSIA because of its "free access" provision. The Court rejected this argument based on the language of the Treaty, which states, in pertinent part, that the nationals of the United States and Liberia "shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws." *Id.* at 443. According to the Court, "[t]he FSIA is clearly one of the 'local' laws to which respondents must 'conform' before bringing suit in United States courts." *Id.* Thus, the Republic of Argentina was entitled to sovereign immunity and the case was dismissed. It necessarily follows that the same "free access" clause of the

Treaty does not create an exception to the doctrine of *forum non conveniens* for Liberian citizens.

The decision in *Argentine Republic* is consistent with how American citizens are treated with respect to well-established law such as *forum non conveniens*. All parties that proceed in the courts of the United States, including American citizens, are subject to the doctrine of *forum non conveniens*. *See, e.g., Howe v. Goldcorp Invests., Ltd.*, 946 F.2d 944, 950-953 (1st Cir. 1991) (affirming *forum non conveniens* dismissal in favor of Canada); *Overseas Nat'l Airways, Inc. v. Cargolux Airlines Int'l, S.A.* 712 F.2d 11, 14 (2d Cir. 1983) (stating that a plaintiff's forum choice is not entitled to automatic dispositive weight); *Alcoa S.S. Co. v. M/V Nordic Regent*, 654 F.2d 147, 159 (2d Cir. 1980) (*en banc*) (stating that "American citizenship is not an impenetrable shield against dismissal on the grounds of *forum non conveniens*" and "American citizenship alone is not a barrier to dismissal on the grounds of FNC"); *Sussman v. Bank of Israel*, 801 F. Supp. 1068, 1073 (S.D.N.Y. 1992), *aff'd*, 990 F.2d 71 (2d Cir. 1993) (stating that "[o]n more than one occasion the Court of Appeals has affirmed *forum non conveniens* dismissal requiring litigation abroad of a claim by an American citizen or a party holding that status."). Treaty beneficiaries are no exception to this rule.

As *Argentine Republic* makes clear, laws such as the doctrine of *forum non conveniens* apply with equal force to parties that enjoy the protection of a treaty, such as Petitioners. *See* Allan Jay Stevenson, *Forum Non Conveniens And Equal Access Under Friendship, Commerce and Navigation Treaties: A Foreign Plaintiff's Rights*, 13 Hastings Int'l & Comp. L. Rev. 267, 277 (1990) ("when a foreign plaintiff sues in a United States court and is entitled to the benefit of a [Friendship, Commerce and

Navigation] treaty, the United States court is obligated to apply the same *forum non conveniens* standards as it would apply to a nonresident United States plaintiff suing upon diversity grounds."). There simply is "[n]o treaty [that] requires that foreign nationals receive more favorable treatment in our courts than would an American litigant." *Alcoa S.S. Co.*, 654 F.2d at 163 (dissent).[9]

B. Petitioner Pollux's New Argument Alleging A Violation Of The Supremacy Clause Of The United States Constitution Was Not Properly Preserved

Petitioner Pollux alleges that the Court of Appeals violated the Supremacy Clause of the United States Constitution by affirming a dismissal on the grounds of *forum non conveniens* when a foreign plaintiff is a ben-

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[9] Additionally, there is simply no support for Petitioners' contention that the "free access" language found in the Treaty provides greater rights than "national access." Pollux Pet. at 9; Springwell Pet. at 9. "National access" provides the greatest rights to foreign citizens; rights equivalent to that enjoyed by United States citizens. *See Blanco v. Banco Indus. de Venezuela*, 997 F.2d 974, 981 (2d Cir. 1993) (holding that no lesser presumption should be accorded to a foreign plaintiff's choice of forum "when a treaty with a foreign nation accords its nationals access to our courts equivalent to that provided American citizens"); *Alcoa S.S. Co.*, 654 F.2d at 153 n.6 (discussing "access to courts" and "no less favorable treatment" clauses *in forum non conveniens* context); *Farmanfarmaian v. Gulf Oil Corp.*, 588 F.2d 880, 882 (2d Cir. 1978) (stating that a treaty allowed foreign nationals access to our courts "on terms no less favorable" than those applicable to American citizens). Moreover, as conceded by Petitioner Pollux, even when a treaty affords "national access," a plaintiff protected by that treaty is not immune from *forum non conveniens* dismissal. Pollux Pet. at 9. "The same *forum non conveniens* standards that [the District Court] would have applied to a United States citizen" must be applied to a foreign plaintiff who has "national access" to American courts. *See Irish Nat'l Ins. Co. v. Aer Lingus Teoranta*, 739 F.2d 90, 91-92 (2d Cir. 1984).

eficiary of a treaty with the United States. *See* Pollux Pet. at i, 5. However, this is the first time that either Petitioner has argued that the Supremacy Clause might be implicated by the motion to dismiss on the grounds of *forum non conveniens*. Since this argument was not raised or resolved below, the Court should not grant certiorari to consider it.

"Ordinarily, this Court does not decide questions not raised or resolved in the lower court[s]." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645 (1992) (citations omitted); *see also Duignan v. United States*, 274 U.S. 195, 200 (1927) (stating that the Supreme Court "sits as a court of review . . . [i]t is only exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed"); *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957); *Lawn v. United States*, 355 U.S. 339, 362 n.16 (1958); *Montana R. Co. v. Warren*, 137 U.S. 348 (1890) (concluding that when the judgment of a court is challenged . . . its rulings alone are open to consideration). This principle helps to maintain the integrity of the process of certiorari. *See Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985) ("Indeed, respondent's argument might have prevailed had it been made to the Court of Appeals. . . . Here we granted certiorari to review an issue squarely presented to and decided by the Court of Appeals, and we will proceed to decide it.").[10] As such, the Court

[10] There are no unusual circumstances in this case that would warrant a departure from the general rule. *See, e.g., Youakim v. Miller*, 425 U.S. 231, 234 (1976) (considering new issue where subsequent to the lower courts' rulings the statute at issue was interpreted in such a way that remanding the case to the District Court would cause the case to be resolved on non-constitutional grounds); *Pollard v. United States*, 352 U.S. 354 (1957) (considering new issues where the petitioner was not represented by counsel below or upon his petition for certiorari). Since there has not been a change in law or extenuating

should not expand its review to consider an issue that was not properly preserved.

In any event, the Supremacy Clause of the United States Constitution does not give Petitioners immunity from the doctrine of *forum non conveniens*. *See Gilbert*, 330 U.S. at 507 ("The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute."). While it may be true that under the Supremacy Clause treaties are accorded the same status as the Constitution and statutes, as mentioned above, even American citizens and corporations protected by the laws and Constitution of the United States are subject to the doctrine of *forum non conveniens*. No one has an absolute right, either by virtue of a treaty or the United States Constitution, to sue in United States courts. *See In re Compl. of Maritima Aragua*, 823 F. Supp. 143, 150 (S.D.N.Y. 1993) (noting that an American citizen does not enjoy an absolute right to sue in an American Court, and a plaintiff, protected by treaty, is subject to the same *forum non conveniens* analysis). This is not an issue as to the interpretation of a treaty, but instead a request that a foreign party be given more protections than those enjoyed by citizens of the United States. The Supremacy Clause only requires the courts to consider and give appropriate deference to the Treaty, which both the District Court and the Court of Appeals did.

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circumstances that prevented Petitioner Pollux from raising these arguments before the Court of Appeals, a grant of certiorari is not warranted. *See Duignan*, 274 U.S. at 200.

C. The Court Of Appeals' Decision Does Not Create A Split In The Circuits

Petitioner Pollux also argues that the Court should grant its Petition because the Court of Appeals' "decision in the instant case conflicts with the Ninth Circuit's ruling in *Hosaka*." Pollux Pet. at 7. Petitioner Pollux is incorrect. *Hosaka v. United Airlines, Inc.*, 305 F.3d 989 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 1284 (2003), addresses the doctrine of *forum non conveniens* as it applied to a case arising under the Warsaw Convention and cannot be seen as precluding the application of the doctrine to all cases where a plaintiff has the benefit of a treaty with the United States. The Warsaw Convention is fundamentally different from the Treaty at issue in this case, and the Court of Appeals' decision in this case has not created a split in the circuits.

Article 28(1) of the Convention for the Unification of Certain Rules Relating to International Transportation by Air (known as the "Warsaw Convention"), Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 (reprinted in note following 49 U.S.C.S. § 40105), specifies four fora in which an action for damages arising from international transportation may be brought.[11] The Court of Appeals for the Ninth Circuit held that by establishing specific fora in which a plaintiff may bring suit, the Warsaw Convention prescribes that a plaintiff's choice of one of these fora is "presumptively convenient." *Hosaka*, 305 F.3d at 995 (discussing *Milor v. British Airways, Plc.*, 1996 Q.B. 702 (Eng. C.A)). The Warsaw Convention is

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[11] The four fora are: (1) where the carrier is domiciled; (2) where the carrier has its principal place of business; (3) where the carrier has a place of business through which the contract was made; or (4) the place where the transportation was to end, known technically as the "place of destination." Warsaw Convention, 49 Stat. 3000, 137 L.N.T.S. 11 (reprinted in note following 49 U.S.C.S. § 40105).

thus quite different than the Treaty of Friendship, Commerce and Navigation between the United States of America and Liberia, 54 Stat. 1739, where no appropriate forum for suit is designated. Instead, the Liberian Treaty provides that Liberian corporations "shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws." Pollux App. at 61a

Any split in authority that may exist between the Ninth Circuit's *Hosaka* decision and other Circuits' decisions interpreting the Warsaw Convention would not be resolved by granting a writ of certiorari in this case. The split in the Circuits, as described by Petitioner Pollux, concerns the applicability of *forum non conveniens* in Warsaw Convention cases, not in treaty cases as a whole. *See* Allen I. Mendelsohn & Renee Lieux, *The Warsaw Convention Article 28, The Doctrine of Forum non conveniens and the Foreign Plaintiff*, 68 J. Air L. & Com. 75, 112 (Winter 2003) ("[T]here always seemed to be general agreement, until the *Hosaka* decision, . . . that FNC was a procedural tool available to federal courts under Warsaw Article 28(2)"); *see also In re Air Crash off Long Island, New York on July 17, 1996*, 65 F. Supp. 2d 207, 213 (S.D.N.Y. 1999) (stating that "[t]he fact that the Warsaw Convention has a special venue provision does not, by itself, preclude the possibility of dismissal on *forum non conveniens* grounds"). Since Petitioners are beneficiaries of the Treaty between Liberia and the United States, not the Warsaw Convention, any review done by the Court would not resolve any potential conflict that may exist.[12]

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[12] Notably, the Court decided earlier this year to deny certiorari in *Hosaka*, a case that could have resolved the very conflict Petitioner Pollux contends is at issue here. *Hosaka v. United Airlines, Inc.*, 123 S. Ct. 1284 (2003) (denial of cert.).

CONCLUSION

For the reasons set forth above, the Petitions for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: New York, New York
December 17, 2003